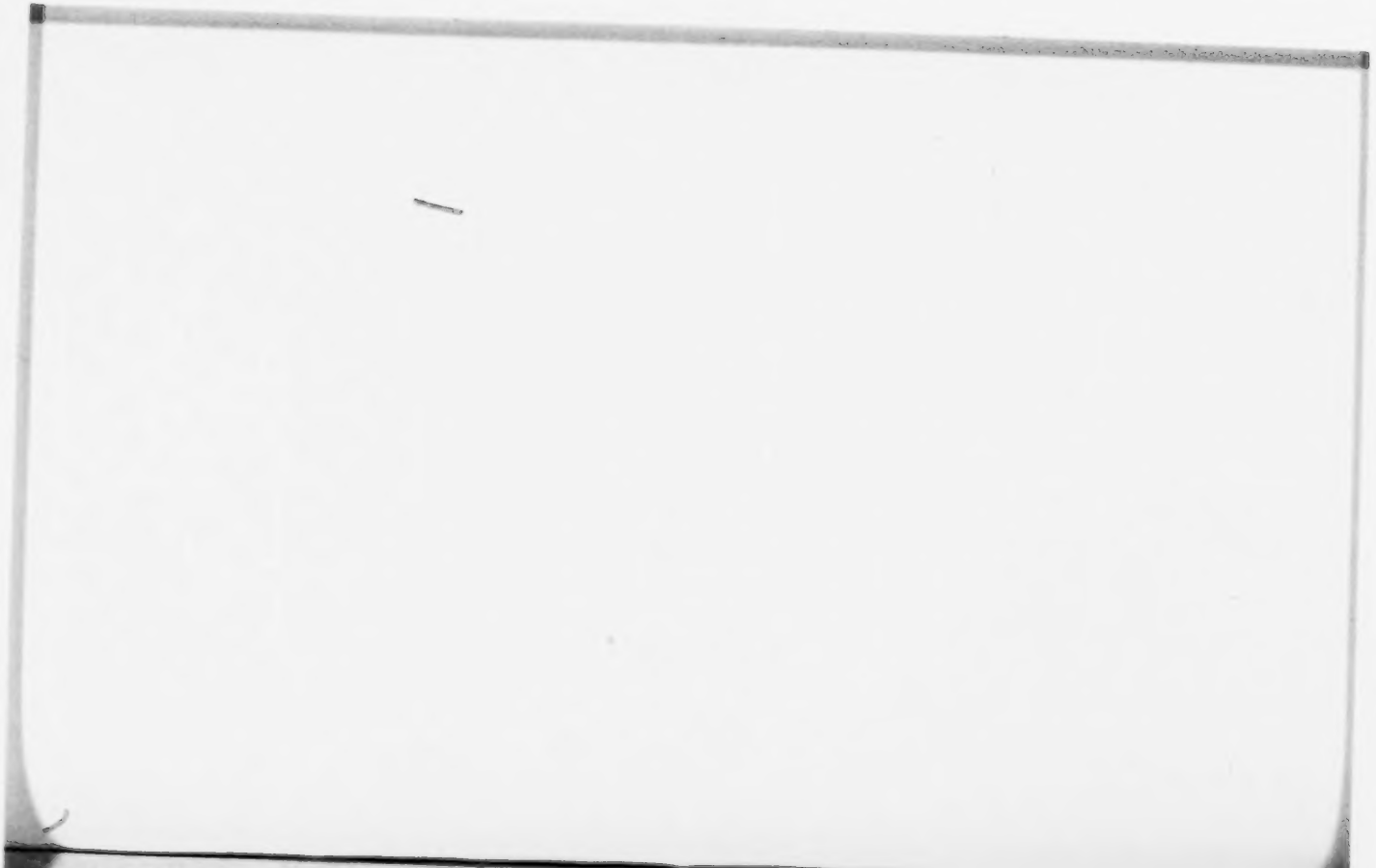


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No. 666

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

FRANK COSTELLO, *Petitioner*

v.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

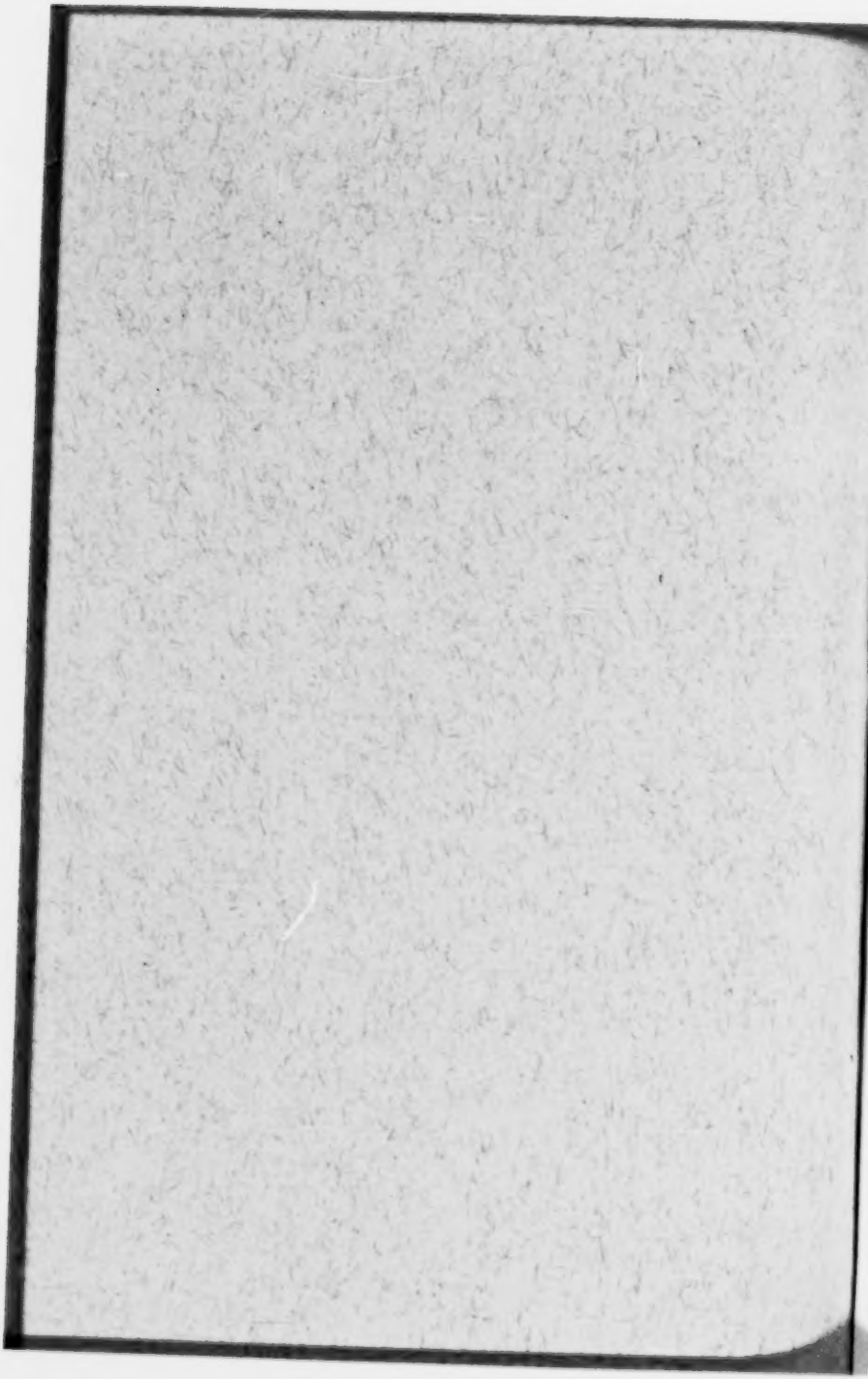
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REPLY BRIEF FOR PETITIONER

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In its memorandum consenting to certiorari herein, the United States conceded that § 3616 (a) of the Internal Revenue Code of 1939 applies to income tax returns. Petitioner's brief on the merits was therefore concerned only with the consequences of the conceded overlap of § 145 (b) and § 3616 (a) in income tax cases.

Instead of filing a brief on the merits in this case, the government filed a memorandum adopting its brief in the case of *Achilli* v. *United States,* Nos. 430 and 834.* This brief contains a complete repudiation of the government's prior concessions concerning the applicability of § 3616 (a) to income tax returns. The first section of petitioner's reply brief deals with this new issue thus interjected into the case. The second section of petitioner's reply brief deals with several new points raised by the government concerning the consequences of an assumed overlap of § 145 (b) and § 3616 (a).

I.

In the case of *Berra* v. *United States,* 351 U.S. 131, the Solicitor General conceded that § 3616 (a) applies to income tax returns. This concession was buttressed with an impressive list of authorities quoted in this petitioner's brief at p. 6. It was repeated in the case at bar, as well as in several other cases presenting the same question.

So confident was the government of the considerations behind this concession that it prosecuted numerous "minor" income tax offenders under § 3616 (a).

* The government's memorandum asserts that the questions presented in this case "are substantially identical to those involved" in the *Achilli* case, and petitioner will attempt no distinction between the two cases herein. It should be noted, however, that the sentence in the *Achilli* case has been reduced to the misdemeanor level (Br. 10-11). It should also be noted that petitioner in the *Achilli* case urges that the overlap of § 145 (b) and § 3616 (a) prohibits the imposition of any sentence whatsoever, while petitioner in the case at bar merely urges that the overlap of these two statutes prohibits the imposition of a sentence in excess of the maximum penalty under § 3616 (a).

Since October of 1952, the government admits that it has invoked this section in no less than 177 cases (Br. 14). In January of 1957, however, this Court granted certiorari in the case at bar. Two months later, the Attorney General gave orders that no further income tax prosecutions were to be instituted under § 3616 (a) pending determination of its scope by this Court (Br. 14). One month later, the Solicitor General filed his brief in the *Achilli* case, urging this Court to hold that § 3616 (a) is inapplicable to income tax returns.

The Solicitor General's *post litem motam* position on this point was anticipated and answered in an *amicus curiae* brief filed in the *Achilli* case on behalf of L. B. Binion. This petitioner desires to add only one point to the arguments of *amicus*. The government's brief in the *Achilli* case urges that R.S. § 3179, the predecessor of § 3616 (a), was superseded by a series of statutes punishing attempts to evade various federal taxes as felonies. By 1939, the government contends that § 3616 (a) "had been so thoroughly superseded by later, specific legislation that it probably applied only to three obscure kinds of taxes, not including the income tax, for which there appeared to have been no evasion or false returns provisions in the acts themselves," namely, the excise tax on certain fish, animal, and vegetable oils (§§ 2490-2494, Internal Revenue Code of 1939), the tax on certain bank notes (§§1900-1907, Internal Revenue Code of 1939), and the excise tax on certain transfers of stock or securities to foreign corporations to avoid income taxes (§§ 1250-1253, Internal Revenue Code of 1939) (Br. 7, 28).

It is interesting to note that, under the government's theory, this brief list is probably too long. Section 2493 provides that the fish oil tax should be collected in the same manner as a duty imposed by the Tariff Act of 1930, and should be treated for the purposes of all provisions of law relating to the customs revenue as a duty imposed by this Act, with certain exceptions not here material. Section 591 of the Tariff Act, 19 U.S.C. § 1591, provides penalties for its evasion similar to those provided for evasion of the income tax. Since there is thus "specific" legislation dealing with evasion of the fish oil tax, the government's own argument leads to the conclusion that § 3616 (a) cannot even be applied to this tax, but must be restricted to the bank note and stock transfer taxes.

The government's interpretation of § 3616 (a) compliments the scholarship of the committee which drafted the 1939 Code, but it scarcely comports with common sense. Common sense decrees that Congress did not include this section in the Code because it was concerned with evasion of these two or three "obscure" taxes. The Solicitor General has not pointed to any prosecution under § 3616 (a) for evasion of these three taxes during the past eighteen years, and petitioner is aware of none. The irresistible conclusion is that the Solicitor General was right the first time, and that Congress intended to punish the filing of *any* false tax return as a misdemeanor. Perhaps Congress might have adopted the statutory scheme now suggested by the government had it been sufficiently prescient to predict the present problem, but the unrestricted scope of the statutory language is eloquent proof that it did not do so.

It appears that the government's present construction of § 3616 (a) is influenced by the fact that only seven persons are now serving sentences imposed under § 3616 (a) for income tax violations, whereas some few more are presumably now serving sentences imposed under § 145 (b) (Br. 15). It should be noted that the problem presented by this case cannot recur under the Internal Revenue Code of 1954, as pointed out in petitioner's main brief at p. 18. In any event, petitioner's constitutional rights cannot be made to hinge upon the number of persons similarly situate. As the Solicitor General himself concedes, his statistics cannot form a valid predicate for application of § 145 (b) to cases of this character (Br. 15). An unconstitutional statutory scheme does not become constitutional by virtue of old age or frequent application.

II.

Assuming *arguendo* the applicability of § 3616(a) to income tax returns, the Solicitor General urges that petitioner's argument is nothing more than a belated attack on the form of the indictment, which should have been raised by a pretrial motion to dismiss under Rule 12 (b) of the Federal Rules of Criminal Procedure. This suggestion completely and conveniently ignores Rule 7 (c) of the Federal Rules of Criminal Procedure, which provides that error in the citation of the statute allegedly violated shall not be ground for dismissal of an indictment unless it misleads the defendant to his prejudice. Here the indictment plainly charged an offense under § 3616 (a). Under Rule 7 (c), the fact that it cited § 145 (b) as the statute allegedly violated would not support a motion to dismiss.

The Solicitor General goes on to concede that the proof required under § 145 (b) and § 3616 (a) is identical in prosecutions for filing false income tax returns, assuming the applicability of the latter statute to cases of this character. He tacitly concedes that this petitioner could not be given cumulative sentences under both statutes for the same course of conduct. He urges, however, that this fact "provides all the more reason why the two statutes may co-exist" (Br. 39).

In support of this conclusion, the government relies principally upon *United States* v. *Gilliland*, 312 U.S. 86, and *United States* v. *Beacon Brass Co.*, 344 U.S. 43. Neither one of these cases in fact supports the government's position. In the *Gilliland* case, this Court merely rejected defendant's contention that the so-called Hot Oil Act of 1935, 49 Stat. 30, impliedly repealed § 35 of the Criminal Code, now 18 U.S.C. § 1001. It did not determine whether these two statutes required the same proof, and hence it was not called upon to decide the consequences of such overlap. Here, of course, the crux of petitioner's argument is that neither § 145 (b) nor § 3616 (a) has been repealed, and that the resultant overlap has deprived him of his constitutional rights.

Moreover, it appears that the two statutes involved in *Gilliland* did not require the same proof. The Hot Oil Act made it a misdemeanor to violate any regulation promulgated thereunder. The applicable regulation required the filing of certain reports, and provided that those reports must make full, truthful, and complete disclosure of the information sought. 35 F. Supp. at 184. Section 35 of the Criminal Code, on the other hand, punished false statements to government agencies. It would seem that the Hot Oil regulations pun-

ished mere omission, while § 35 required an affirmative act, *i.e.*, the filing of a false statement. Cf. *Spies* v. *United States*, 317 U.S. 492.

Equally inapposite is the *Beacon Brass* case. There this Court was careful to emphasize that the statutes before it *required different proof*. See opinion of Mr. Justice Black, dissenting, in *Berra* v. *United States*, 351 U.S. at 138-139. Under these circumstances, the government was free to prosecute under both statutes, and the defendant could not be heard to complain if it elected to proceed under only one of them. Virtually all of the lower court decisions cited at pp. 42-43 of the government's brief in *Achilli* must be distinguished from the case at bar on this same ground.

In conclusion, the Solicitor General urges that there has been no denial of equal protection in this case because there has been no interference with the court's discretionary sentencing power. The fact is, however, that the prosecutor's claim of authority to invoke either felony or misdemeanor provisions does interfere with the court's discretionary sentencing power. It is true that a trial judge can impose a one-year sentence under an indictment charging that the defendant attempted to evade and defeat the income tax by filing a false return. But a trial judge cannot impose a five-year sentence under an *information* charging that the defendant filed a false return with intent to defeat and evade the income tax. No matter how serious the circumstances of the offense or how dangerous the propensities of the offender, the judge in the latter case is restricted by the sentencing provisions of the misdemeanor statute.

It is petitioner's position that this arbitrary discrimination between defendants who have committed identi-

cal offenses under identical circumstances seriously interferes with the court's "discretionary sentencing power." The government has produced no authority to sustain such unequal protection of the laws. Consequently, petitioner urges that he is entitled to the relief demanded in his brief on the merits.

Respectfully submitted,

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APRIL, 1957